HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
WRIT PETITION NO. 1483 OF 2005.

1. Dilip Pandurang Kamath,
Aged 44 years, Occu: Service,
R/o: RNA Park, A-1, 302, Vashi
Naka, Chembur, Mumbai 400 074.

2. Abdul Rasheed Sikandarsab
Kulkarni, Aged: 47 years,
Occu: Advocate, R/o: Flat No.201,
Shahid Apartments No.16,
"C" Street, Haines Road,
Fraser Town,
Bangalore 560 005.

3. Chenna Boyanna Krishna Yadav,
Aged: 41 years, Occu: Advocate/
Ex-MLA, R/o: H. No. 18-5-757,
Lal Darwaza,
Hyderabad 500 253 (A.P.)

4. Gokul Bhagaji Patil,
Aged 54 years, Occu: Service,
R/o: Ganesh Darshan,
2nd Floor, Chaitanya Sankul,
Badlapur, Shirgaon,
MIDC Road, Dist: Thane.

5. Mohammed Chand Mulani,
Aged 61 years, Occu: Retired ACP,
Resident No. 667, Besides Aroh
Mangal Karyalaya, Datta Nagar,
Ambegaon, Katraj,
Pune.
(Presently lodged in Yerwada
Central Prison Pune.) ..PETITIONERS.
(Orig. Accused Nos. 44,49,53,58 & 61.)

Versus.

The State of Maharashtra,
(In the instance of Bund
Garden Police Station, Pune,
in C. R. No. 135/2002)
Through: CBI, Kitab Mahal,
Mumbai. ..RESPONDENTS.

Shri. S. R. Chitnis, i/b S/Shri. Sachin Kivansara and M. Rupender, for Petitioners Nos. 1 to 4.
Shri. Amin H. Solkar for Petitioner No.5.
Shri. Raja Thakare and Shri. A. M. Chimalkar, Advocates for the respondent - C.B.I.
Shri. D. S. Mhaispurkar, A. P. P. for the State.

CORAM: S.B.MHASE &
S.R.SATHE, JJ.
DATE: October 14, 2005.

ORAL JUDGMENT (PER S.B.MHASE,J.).

1. The Petitioners have approached this Court invoking jurisdiction of this Court under Article 226 of the Constitution of India and thereby seeking the writ of *habeas corpus.* The petitioenrs are original accused Nos. 44, 49, 53, 56 and 61 respectively in Special Case No. 2 of 2003, pending before the Special Court (MCOC Court) at Pune, which arises from Crime No. 135 of 2002 registered with Bandgarden Police station. The Said offence was registered and charge sheet was filed under sections 255, 256, 257, 258, 260, 263-A, 419, 420, 467, 468, 471, 472, 473 and 474 of the IPC, Sections 3(1)(2), 3(2), 3(4), 3(5), 4 & 24 of the Maharashtra Control of Organised Crime Act, 1999 (hereinafter, in short, referred to as "**the MCOC Act"**.), Section 63(a) of the Bombay Stamp Act and Section 13(a) & 13(d) of the Prevention of Corruption Act. This case is commonly known in the media and the public as "The Telgi Stamp Scam Case". Petitioenr

No.1 (original accused No. 44) was arrested on 13.6.2003 and was taken in judicial custody by order dated 10th July 2003 and the Charge sheet was filed against him on 15.9.2003. The Petitoner No.2 (original Accused No.49) was arrested on 5.8.2003, he was remanded to judicial custody on 22.8.2003, the charge sheet against him was filed on 5.9.2003. The petitoner No.3 (original accused No. 53) was arrested on 6.9.2003, was remanded to judicial custody on 26.9.2003, and the charge sheet against him was filed on 29.12.2003. The Petitioner No.4 (original accused No.56) was arrested on 18.10.2003 and was remanded to the judicial custody on 3.11.2003, the charge sheet was filed against him on 29.12.2003. Petitioner No. 5 (original accused No. 61) was arrested on 4.12.2003 and was remanded to the judicial custody on 16.12.2003, charge-sheet against him was filed on 3.2.2004. Since then, these accused are in judicial custody pending the trial.

2. The above-referred dates will show that, initially, the judicial custody was granted on the respective dates under section 167 of the Code of Criminal Procedure, 1973 and from the date of the filing of the charge-sheets, since congnizance has been taken, the Petitioners are in judicial

custody/remand granted as per the provisions of Section 309(2) of the Code of Criminal Procedure, 1973. All these accused - petitioners, after their arrest, from time to time have applied for bail on merit before the Special Court (MCOC Court), Pune. After hearing them, their bail applications were rejected by the Special Court. When this petition was pending simultaneously, the Petitoners have filed bail applications before the learned Single Judge of this Court, the same are as under:

. (a) Petitioner No.1 Bail Application No.4319 of 2004.
. (b) Petitioner No.2 bail application No.4869 of 2004.
. (c) Petitioner No.3 bail application No.4853 of 2004.
. (d) Petitioner No.4 bail Application No.4004 of 2004.
. (e) Petitioner No.5 bail application No.3885 of 2004.

. It is reported that while this petition was being heard, the application of the petitioner No.1 for bail was rejected by the learned Single Judge.

3. It is worthwhile to mention that from the date of arrest till the filing of the petition, the Special Court has granted remand from time to time. However, these orders are not subject of challenge in this petition. On the contrary, all these proceedings

upto May 2005 have been accepted to be valid by the Petitioners.

4. As the charge-sheet has been filed against the petitioners under the MCOC Act, the cases of the Petitioners are triable by the Special Court within whose local jurisdiction the offence was committed or before the Special Court constituted for trying such offence. Section 6 of the MCOC Act makes a provision in respect of the exclusive jurisdiction of the Special Court to try the cases under the said Act. Section 5 of the said Act contemplates that the Government may, by notification in the official gazette, constitute one or more Special Courts for such area or areas, or for such case or class or group of cases, as may be specified in the notification. It is further provided in sub-section (3) of Section 5 that such Special Court shall be presided over by a Judge to be appointed by the State Government with the concurrence of the Chief Justice of the Bombay High Court. The said provision further states that the State Government may also appoint, with the concurrence of the Chief Justice of the Bombay High Court, additional Judges to exercise jurisdiction in a Special Court. Sub-section (4) provides that person to be appointed as a Judge or additional Judge of a

Special Court shall be Sessions Judge or Additional Sessions Judge. Sub-section (5) of Section 5 regulates the business of the Special Court. It provides that where the additional Judge or Judges are appointed in Special Court, the Judge of the Special Court may from time to time, by general or special order in writing provide for distribution of the business of the Special court amongst himself and additional Judge or additional Judges and also for the disposal of the urgent business in the event of his absence or the absence of any additional Judges.

. Thus, on reading these provisions, it is made clear that the business of the Special Court shall be regulated by a general or special order made by the Special Judge, and the said general or special order may be pertaining to the distribution of the business of the Special Court amongst the Special Judge and Additional Judges of the Special Court. It may or shall also provide for the disposal of the urgent business in the absence of the Special Judge or any of the additional Judges. Suffice it to say at this stage that, for the purposes of this petition, in the absence of the Special Judge, it is the Special Judge who is going to remain absent, who will entrust the business of his Court by order made in writing

under these sections to any of the additional Special Judge of the Special Court. The Special Judge can also make an order as to how the business in the absence of any of the Judge or Additional Judge of the Special Court is to be carried out.

6. Admittedly, at Pune the Special Court was constituted by the Government for conducting the cases under the MCOC Act. Apart from constituting the Special Court, and appointing the Special Judge for the Special Court, the government has also appointed two additional Judges for the Special Court.

7. Shri. Shembole was appointed as the Judge of the Special Court by Government of Maharashtra with the concurrence of the Chief Justice of the Bombay High Court by issuing notification dated 4th March 2002. So also, by another notification, Shri. B. N. Deshpande and Shri. V. V. Borikar were appointed as the Additional Judges of the Special Court constituted under the MCOC Act. The case of the Petitioners was being dealt with by the Judge of the Special Court Shri. Shembole and all the orders till 5.5.2005, including the judicial custody remand order under section 309(2) of the Code of Criminal Procedure, were passed by Shri. Shembole. It appears from the

order-sheet that on 8.4.2005, the case was resumed before the Judge of the Special Court, when one of the Petitioners was produced on video conference and the rest of the petitioners were not produced through Video Conference and the case was adjourned to 5.5.2005. There is no dispute on the fact that on this date, the judicial custody remand was granted by the Judge of the Special Court till 5.5.2005. However, the whole controversy, according to the Petitioners, is about the proceedings that has taken place on 5.5.2005.

8. We have already stated in the above paragraph that there were three Judges of the Special Court established under the MCOC Act. However, Shri. Shembole before whom this case bearing MCOC Special Case No.2 of 2003 was pending was not available on 5.5.2005, i.e., the date till which the judicial custody remand order was granted by the said Judge, as stated earlier. Therefore, it was further necessary to pass the appropriate judicial custody remand orders under section 309(2) of the Code of Criminal Procedure on the said date. However, Shri.Shembole was on summer vacation from 2.5.2005 till 15.5.2005. Additional Judge of the Special Court, Shri. B.N.Deshpande, was also on judicial leave (Summer

Vacation) from 2.5.2005 till 15.5.2005. It is further to be noted that the Second Additional Judge of the Special Court, Shri. V.V.Borikar, who then also was the 4th Additional District & Sessions Judge, Pune was also on Earned Leave from 5.5.2005 to 7.5.2005 and the charge of the said court was kept with Shri. P. P. Birajdar, the 5th Additional District & Sessions Judge, Pune. It is an admitted fact that Shri. P.P.Birajdar, 5th Additional District & Sessions Judge, Pune was not the Judge and/or additional Judge appointed by the Government of Maharashtra under section 5 of the MCOC Act and therefore, he was not supposed to preside over and try the case under the MCOC Act. However, the charge came to Shri. Birajdar in view of the standing order No. Gen-B-16/ii/46/93 dated 26th June 1993, which gives a general power to the District Judge to make an arrangement about the business of the court when one of the Judge/court proceeds on leave and/or summer vacation. We have ascertained by making an enquiry through the Registry with the Special court that the Special Court has not passed any general or specific orders as contemplated by sub-section (5) of Section 5, which provision has already been dealt with in the above paragraphs. Under these circumstances, the above case, namely, MCOC Special Case No. 2 of 2003 was placed before

Shri. P. P. Birajdar, the 5th Additional District & Sessions Judge, Pune. On this date, none of the accused who were in judicial custody were produced before Shri. Birajdar, the 5th Additional District & Sessions Judge, Pune, since the Video Conferencing facility was not available in the court of Shri.P.P.Birajdar. On behalf of the respondent, Police Officer preferred an application, stating that the counsel for the CBI - Shri. Raja Thakare was busy in the High Court and requested to adjourn the matter. On this application, Shri. P.P.Birajdar, the 5th Additional District & Sessions Judge, Pune passed an order of "Other Side to Say", upon which the Advocate for one of the accused - Mr. Telgi has stated that he has no objection to grant adjournment. However, Shri.P.P.Birajdar, the 5th Additional District & Sessions Judge, Pune did not pass any order as to whether the adjournment is granted or not and the application remained as it is. On this date, it appears from the order-sheet, that the case was posted to 8.6.2005. From the order-sheet, it is not clear whether the judicial custody remand of the accused, and more specifically of the petitioners, was extended under section 309 of the Code of Criminal Procedure. However, now it is an admitted position by the respondent that on 5.5.2005, except the presentation

of the application by the CBI for the adjournment, no business was transacted before Shri. P.P.Birajdar, the 5th Additional District & Sessions Judge, Pune. The case was simply put before him and he put the same case, after passing certain casual orders, to 8.6.2005. However, for the point in controversy, it is an admitted fact that on that date Shri.P.P.Birajdar, the 5th Additional District & Sessions Judge, Pune has not passed any order extending the judicial custody remand by exercising the powers under section 309 of the Code of Criminal Procedure and simply adjourned the case to 8.6.2005.

9. This petition has arisen from the above referred MCOC Special Case No. 2 of 2003. The grievance of the petitioners is that on 5.5.2005, the case could not have been placed before Shri.P.P.Birajdar, the 5th Additional District & Sessions Judge, Pune, because he was not appointed as the Judge of the Special Court by appropriate notification by following the procedure as laid down under section 5 of the MCOC Act and, therefore, the said Judge was incompetent to deal with and try the cases under the MCOC Act. Therefore, the act on the part of Shri.P.P.Birajdar, the 5th Additional District & Sessions Judge, Pune to adjourn the case to 8.6.2005

is illegal one, and thereby the detention of the Petitioners is illegal one.

. The second ground on which the Petitioners have approached this Court is that from 5.5.2005 upto 8.6.2005, there were absolutely no orders passed under section 309(2) of the Code of Criminal Procedure, remanding the accused - petitioners to the judicial custody. Therefore, the detention of the petitioners in custody is illegal and bad in law. Thus, it is the contention of the petitioners that their Constitutional right under Article 22 is violated. Thus, they have approached this court by filing this petition for habeas corpus.

10. This petition was presented in this court on or about 26th May 2005. It was moved for circulation on 27.5.2005 and the circulation was granted for 1.6.2005. On 1.6.2005, the matter was adjourned beyond vacation so as to put up the matter before the Regular Bench. It was circulated before the Division Bench on 10.6.2005. On the said date, the Advocate for the Petitioners was absent and, therefore, the matter was adjourned for two weeks. However, later on at 2.55 p.m., the Advocate for the Petitioners appeared and sought leave to amend, which

was granted. The matter was recirculated after amendment on 17.6.2005. However, on the said date, by the consent of both sides, the matter was adjourned to 27.6.2005. It appears from the order dated 27.6.2005 that the Division Bench has given oral directions to the petitioner to produce the Roznama of the case, and since it was not produced, the matter was adjourned for two weeks to enable the Advocate for the Petitioners to get a copy of the roznama. Again on 11th July 2005, learned counsel for the Petitioner requested for time to place the Roznama of the case on record. Therefore, the case was adjourned to 25.7.2005. On 25.7.2005, the learned counsel for the petitioners submitted that he wanted to withdraw from the case but he had to follow the procedure and requested for time. Therefore, the matter was adjourned to 8.8.2005. On 8.8.2005, counsel for the Petitioners was absent, and therefore, it was adjourned for two weeks. On 22.8.2005, the matter appeared before this Bench when we have taken a note of all these facts and directed the office to issue notice to the petitioners to make an arrangement of the counsel to conduct their case and / or to see that their advocate remains present. However, after we had passed order in the Morning Session, we received a telegram from the Petitioner - Dilip Kamth.

Therefore, we placed the matter on the very next day, i.e., on 23.8.2005. On 23.8.2005, learned counsel Shri. Amin Solkar for the petitioners was present and tried to get discharge from the case, but when it was pointed out to him that unless the procedure to withdraw has been followed, the discharge from the case cannot be granted. However, he reported that the petitioners did not desire to continue him. Therefore, we again granted some time to Shri. Amin Solkar. On 30.8.2005, Shri. Amin Solkar produced a letter addressed to the petitioners upon which there were endorsements of petitioner Nos. 1 to 4 and he was instructed to withdraw from the case. Therefore, we discharged Shri. Amin Solkar from the case. However, Shri. Solkar remained on record for one Petitioner, namely, Petitioner No.5. In view of these circumstances, we issued a direction to the office to issue a production warrant, to present the Petitioners before this court on 19.9.2005. On 19.9.2005, in afternoon session, Petitioner Nos. 1 to 4 were presented. Shri. Amin Solkar learned counsel for the petitioner No.5 was absent. We heard Petitioner Nos. 1 to 4 on the point of admission of the petition. However, since the court time was over, the respondent could not be heard. However, petitioner Nos.1 to 4 stated that so far as the reply to the argument of the

CBI counsel is concerned, they would make an arrangement by discharging Shri. Amin Solkar, Advocate to appear and make a submission on their behalf. We adjourned the matter to 22.9.2005. On 22.9.2005 we heard the matter and we granted rule returnable one week. Thereafter the matter was heard on 29.9.2005 onwards. We have placed on record this history of proceeding to demonstrate that the time which was consumed in such an important petition of habeas corpus is not attributable to the lapse or laxity on the part of this court. The above facts and adjournments taken from time to time by the parties are self-evident of the fact that it is the petitioners who were responsible for the delayed hearing of this petition.

11. In the present matter, initially, on 23.8.2005 the respondent has filed an affidavit on behalf of the CBI opposing the admission of the petition, later on the additional affidavit was filed by the CBI on 21.9.2005 along with certain documents. After we had given directions to produce orders passed by Shri.P.P.Birajdar, the 5th Additional District & Sessions Judge, Pune and the order sheet, the further affidavit was filed by the CBI on 5th October 2005. At the time of hearing of the petition on 29th

September 2005, the brief submissions on behalf of the CBI were tendered and along with the brief submissions, the copies of the Standing Charge Arrangement Order passed by the District & Sessions Judge on 22.6.1993 was produced. So also the order sheet of the case and the copies of the remand warrants issued by the Judge of the Special Court in respect of each of the Petitioners were produced. So also the notification issued by the Government of Maharashtra under Section 5 of the MCOC Act, 1999 dated 9th July 2005 making appointment of Shri. M. B. Sardeshpande, the 4th Additional District & Sessions Judge, Pune is produced on record, since Shri. Shembole, the earlier Judge of the Special Court was transferred from the said place.

12. Learned Senior Counsel Shri. Sushilkumar appearing for the CBI submitted that assuming for a moment that the detention of the Petitioners from 5.5.2005 to 8.6.2005 is illegal, the petition filed by the Petitioners for the habeas corpus cannot be allowed. He submitted that the under the habeas corpus petition, the court is expected to see the legality or illegality of the detention on the date of return and not on the date of the institution of the petition. He submitted that after the alleged period

of illegal detention, there are five orders passed by the Judge of the Special Court on 8.6.2005, 28.6.2005, 27.7.2005, 19.8.2005 and 16.9.2005 which are valid orders granting custody under section 309(2) of the Code in respect of the Petitioners. Therefore, he submitted that on the date of return there are valid orders of the remand as a result of which the Petitioners are detained in the custody under section 309(2) of the Code of Criminal Procedure, 1973. Therefore, he submitted that the petition deserves to be dismissed.

13. Further, pointing out the remand warrants produced on record, learned Senior Counsel for the CBI, Shri. Sushilkumar submitted that initially the remand order was issued to the Superintendent of Prison, Yerwada Central Prison on 26.9.2003 in respect of the Petitioner No.3 and, thereafter from time to time on the same warrant, Judge of the Special Court has extended the remand period. He pointed out that it appears that the rubber stamp has been prepared to the effect that **"Accused is produced / not produced before me and he be produced before me on....."**. He submitted that this was a stamp when Video Conferencing was not there and after the introduction of the Video Conferencing system, the rubber stamp was

modified to the effect that **"Accused is produced before me on Video Conference and he be produced on Video Conference before me on ....."**, and by the use of such stamp, endorsement made on original warrant, further judicial custody / remand has been extended from time to time. He also pointed out that the similar are the warrants in respect of the rest of the Petitioners and there are similar endorsements for extension. His submission is that this exercise on the part of the Judge of the Special Court is proper exercise of the powers under section 309(2) of the Code of Criminal Procedure, 1973. He submitted that these warrants coupled with the order sheets make a complete compliance of Section 309 of the Code of Criminal Procedure, 1973. Thus, he submitted that on the date of return, since there are valid orders passed by the Judge of the Special Court, the earlier period for which the Petitioners are making grievance of illegal detention will not have any bearing and the petition be dismissed. He also submitted that even if it is assumed that the exercise of powers by the Judge of the Special Court by use of the rubber stamp may not be proper mode of exercise of powers, but it does not render the judicial custody as illegal one. Thereby he submitted that the orders are valid one and prayed for the dismissal of the petition.

14. Learned counsel for the Petitioners Shri. Chitnis submitted that the facts alleged in the petition as to what happened on 5.5.2005 are admitted by the respondents and even inspite of the opportunity being given to them, respondents have not produced any material to demonstrate that the proper orders as contemplated under section 309(2) of the Code of Criminal Procedure, 1973 have been passed by the Judge of the Special Court. On the contrary, he submitted that section 309(2) is a mandatory provision and unless there is a remand order directing the judicial custody of the Petitioners, the detention of the Petitioners in the custody is illegal one. This amounts to constitutional violation and it cannot be corrected by subsequent valid remand orders. Learned counsel further submitted that the so called warrants which have been produced on record is not a valid exercise of power. He submitted that, initially there should be judicial order granting remand as desired by Section 309 and thereafter the warrant should be issued. He insisted that in the present matter, inspite of the opportunity being given for the production of the order sheet, order sheet produced does not show that any judicial order has been passed by the Judge of the Special Court granting judicial

custody. He submitted that everytime whenever the remand is granted on adjourned dates, the fresh remand order as per the format should have been passed by the Judge of the Special Court. Since such format order has not been issued, the extension of the remand of the Petitioners in the judicial custody by use of the rubber stamp is a procedure not contemplated under section 309 of the Code. He submitted that it is a mechanical exercise of the power and, such exercise of pwoer made with the use of the stamp shows that there is no application of mind by the Judge and therefore the remand orders and the extension of the remand as evidenced from the remand warrants is illegal. Thus, he submitted that even assuming that the case of the Petitioners for habeas corpus is to be considered on the date of return, it will be crystal clear that even on the date of return there are no valid remand orders passed putting the Petitioners in the judicial custody. Therefore, the writ of habeas corpus must follow.

15. Shri. Amin Solkar who appears for the Petitioner No.5 submitted that if the remand warrants which are produced on record from 8.6.2005 onwards are perused, it will be seen that the remand orders are granted for a period of more than 15 days at a time.

He submitted that proviso to sub-section (2) of Section 309 contemplates that the remand order shall be for a period of 15 days only. Relying upon the judgments of the **State of Tamil Nadu v/s. V. Krishnaswami Naidu & Another reported in AIR-1979 SC 1255**; **A. R. Antulay v/s. Ramdas S. Naik & Another, reported in AIR-1984 SC 718, and**; **Harshad Mehta & Ors. v/s. State of Maharashtra, reported in 2001 Cri. L. J. 4259** he submitted that position of the Special Judge has been scrutinised by the Apex Court in these judgments, and the Apex Court has desired to read the words "Special Judge" by incorporation in the Code of Criminal Procedure, 1973 wherever necessary. Special Court is the court of original criminal jurisdiction having the power to take cognizance and try the cases. He submitted that, therefore, in the the First proviso of Section 309(2) in-stead of words "Magistrate" the words "Special Court" or the "Judge of the Special Court" shall be incorporated, and, thus interpreted it follows that Judge of the Special Court cannot grant judicial custody for a period of more than 15 days at a time. He, therefore, submitted that since the judicial custody remand in the present matter, on the date of return is for a period of more than 15 days at a time, remand order/s which has been passed by the use of the

rubber stamp is/are illegal and the Petitioners are entitled for the writ of habeas corpus and/or bail as has been done in the case of **State of T. N. V/s. Pandya, AIR-2001 SC 2972.**

16. So far as the position of the case on 5.5.2005 is concerned, it will be revealed that the case of the Petitioners was placed before Shri.P. P. Birajdar, the 5th Additional District & Sessions Judge, Pune, who was admittedly not a Judge of the Special Court appointed under section 5 of the MCOC Act, 1999. But, on perusal of the order sheet it will be seen that on 5.5.2005 though Shri. P. P. Birajdar, the 5th Additional District & Sessions Judge, Pune has signed the order sheet as an In-charge Special Judge, Pune, yet he has not passed any order. It requires to be mentioned, at this stage, that on 5.5.2005, either for Shri. P. P. Birajdar and/or the Judge of the Special Court had the Judge of the Special Court been present on that day, it was not necessary to do anything, because the cognizance has already been taken long back as contemplated under section 309(2) of the Code of Criminal Procedure, 1973 and the orders of the remand as desired under sub-section (2) of Section 309 of the Code of Criminal Procedure, 1973 were being passed from time to time on

earlier occasions. On 5.5.2005 had the Judge of the Special Court been present, the case could not have proceeded since the total record of the proceeding has been called by the Apex Court and except the applications submitted from time to time and order sheets and the remand orders, no other record appears to have been with the Special Court. Therefore, it is an admitted position that the hearing of the case would not have proceeded and only exercise which the Judge of the Special Court was required to do was to grant a judicial custody remand and/or to extend the judicial custody remand which has already been granted by exercise of power under section 309(2) of the Code of Criminal Procedure, 1973. This requires to be mentioned to make it clear that the position of the case on 5.5.2005.

17. So far as Shri.P.P.Birajdar, the 5th Additional District & Sessions Judge, Pune is concerned, he admittedly entertained an application for adjournment submitted by the respondent - CBI, since their counsel - Shri. Raja Thakare was busy in the High Court, Bombay and on that application also he had not passed any order granting adjournment. If the said application is perused, it will be seen that the Court has passed order "Other side to say" and one of

the accused has given no objection for adjournment and case was adjourned to 8.6.2005. Thus, on perusal of order sheet dated 5.5.2005, it is evident that there was no judicial custody remand order passed by Shri. P. P. Birajdar, the 5th Additional District & Sessions Judge, Pune. Since the jail warrants addressed to the Superintendent of Jail have been produced on record, on perusal of these warrants it is revealed that there is an endorsement on earlier date, i.e., on 8.4.2005, in respect of the Petitioner No.3 that- the accused not produced before me on Video Conference, and he be produced on Video Conference on 5.5.2005. Similar are the endorsements in respect of the Petitioner Nos. 2, 4 & 5. In case of the Petitioner No.1 (the original accused No.44), there is an endorsement that- "he was produced before me on Video conference, and he be produced before me on video conference on 5.5.2005". However, on these warrants there is no further endorsement made by Shri. P. P. Birajdar, the 5th Additional District & Sessions Judge, Pune extending the judicial custody remand, either by use of the rubber stamp or by any written order directing the accused to remand till 8.6.2005.

18. Perusal of the remand warrants shows that

there is no endorsement made by any Court Officer and/or more specifically by Shri.P.P.Birajdar, the 5th Additional District & Sessions Judge, Pune that the judicial custody of the Petitioners has been granted upto 8.6.2005. Thus, the only inference follows that without the orders of any court, the Petitioners were kept in prison from 5.5.2005 to 8.6.2005. Because, on perusal of the said remand warrants it will be evident that those warrants have further been endorsed on 8.6.2005, 28.6.2005, 27.7.2005, 19.8.2005 & 16.9.2005 granting judicial custody remand, making use of the rubber stamp. All these remand warrants have been signed by the Judge of the Special Court who is competent to sign. Suffice at this stage to state that the detention of the Petitioners from 5.5.2005 till 8.6.2005 is unauthorised one, i.e., on the date of the presentation of the petition. The question of validity of the use of rubber stamp by which the further extension of judicial custody was granted on 8.6.2005 will be dealt with in the later part of the judgment.

19. At this stage, we find it appropriate to consider- whether the detention of the Petitioners being illegal one on the date of the presentation of

the petition, they are entitled to a writ of as prayed for or not. It is further necessary to consider whether the date of institution or the date of return is the date for issue of writ of habeas corpus.

20. In this respect, it is observed by the Apex Court in the matter of **Naranjan Singh Nathwan & Others v/s. State of Punjab reported in AIR-1952 106,** as follows:

> "If at any time before the Court directs the release of the detenu, a valid order directing his detention is produced, the Court cannot direct his release merely on the ground that at some prior stage there was no valid cause for detention. The question is not whether the later order validates the earlier detention but whether in the face of the later valid order the Court can direct the release of the Petitioner. The Learned Judges point out that the analogy of civil proceedings in which the rights of parties have ordinarily to be ascertained as on the date of

the institution of the proceedings has no application to proceedings in the nature of habeas corpus where the Court is concerned solely with the question whether the applicant is being lawfully detained or not.

.....

Once it is conceded that in habeas corpus proceedings the Court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the date of the institution of the proceeding, it is difficult to hold, in the absence of proof of bad faith, that the detaining authority cannot supersede an earlier order of detention challenged as illegal and make a fresh order wherever possible which is free from the defects and duly complies with the requirements of the law in that behalf."

21. **In Ram Narayan Singh v/s. State of Delhi & Others reported in AIR-1953 SC 277,** the Apex Court has observed as follows:

> "It has been held by this court that in habeas corpus proceedings the Court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the institution of the proceedings."

22. **In Talib Hussain v/s State of Jammu & Kashmir reported in 1971(3) SCC 118,** the Apex Court observed as follows:

> "In regard to the submission that the petitioner was arrested and deprived of his personal liberty long before the order of his arrest and this invalidated his detention, it is sufficient to point out that in habeas corpus proceedings the Court has to consider the legality of the detention on the date of hearing. If on the date of hearing, it cannot be said that the aggrieved party has

been wrongfully deprived of his personal liberty and his detention is contrary to law, a writ of habeas corpus cannot issue."

23. The same is the view expressed in the matter of Kanu Sanyal V/s. District Magistrate, Darjeeling & Others reported in 1974 Criminal L. J. 465, and in the matter of Col. Dr. B. Ramchandra Rao v/s. The State of Orissa & Others reported in (1972) 3 SCC 256 and in the matter of Gadavari S. Parulekar etc. v/s. State of Maharashtra reported in 1966 Cri. L. J. 1967. These above referred judgments have conclusively laid down the principle that in a habeas corpus petition the legality and/or illegality of the detention has to be considered on the date of return that and not on the date of the institution of the matter, because if it is found that on the date of the return there is a valid order detaining the concerned person, the said order cannot be invalidated as a result of the earlier invalid order or earlier illegal detention. It is the later valid order which will survive. Only thing which the court has to be satisfied that the later order is a valid order. Viewed from this angle, since the returnable date in this petition is 29th September

2005, we will have to scrutinise the legality or illegality of the order with reference to that date, i.e., 29th September 2005.

24. The insistence of the Petitioners to consider the legality or illegality of the detention of the Petitioners under section 309 of the Code to the date of the institution of the petition is not sustainable in law. Therefore, we accept the submission made by the learned counsel for the CBI that the legality or illegality of the Petitioners' detention will have to be decided with reference to the date of return, i.e., on 29th September 2005.

25. As we have discussed above, that after filing of this petition and more specifically from 8.6.2005 onwards Judge of the Special Court has passed five remand orders extending the remand. Those orders are dated 8.6.2005, 28.6.2005, 27.7.2005, 19.8.2005 and 16.9.2005. By the last order dated 16.9.2005, the judicial custody remand of the Petitioners is extended upto 15.10.2005. Even though it may be a repetition, but we would like to put on record that the remand warrants have been produced on record and in respect of each of the Petitioners there is a remand warrant

issued under section 309, initially in a proper format. In earlier paragraph of this judgment, we have stated the dates in respect of the each of the Petitioners when he was taken in judicial custody. Thereafter on each later date, in respect of the each of the Petitioners, the judicial custody has been extended by an endorsement made on the same warrant to the effect that "accused is produced / not produced before the court, accused be produced on ..... " and after the introduction of the video conference facility, "the accused is produced / not produced before me on video conference scheme, he be produced on video conference scheme on .....", as per the requirement, necessary portion of the rubber stamp was scratched each time showing the production or non production of the accused before the court in person or through video conference. All these endorsements have been signed by the Special Judge under the MCOC Act, 1999. What we find that prior to 5.5.2005 similar endorsements extending the judicial custody remand have been made and after 8.6.2005, the five endorsements on the respective dates have been made and signed by the Judge of the Special Court under the MCOC Act, 1999.

26. On perusal of the order sheet we only find

that there is mentioning of the accused persons' presence, being produced on the video conference scheme and / or being not produced on the video conference scheme in respect of the each of the accused and thereafter further dates have been granted. Thus, from the perusal of the order sheets, we do not find that there was any order passed by the Judge of the Special Court in respect of the remand to the judicial custody. However, we find that the fact of the production and non production of the accused has been stated in the order sheet and the reasons for adjournments are also equally reflected. Only thing which is not available in the order sheet is the order in respect of the remand to the judicial custody. However, as we have stated earlier, those orders are available on remand warrants.

27. At this stage, we must mention one aspect that is to the extent of the competency of the Judge to pass order either in the order sheet or on remand warrant is concerned, the Petitioners' counsel accepts that the Judge who made the endorsement on remand warrants on 6.8.2005 onwards on five occasions is the competent Judge appointed by the Government of Maharashtra in exercise of the power under section 5 of the MCOC Act, 1999. Therefore, so far as the

competency of the Judge passing order on and after 8.6.2005 is concerned, there is no dispute. The question of the competency of the Judge was raised qua Shri. P. P. Birajdar, the 5th Additional District & Sessions Judge, Pune before whom the case was placed on 5.5.2005 and not in respect of the subsequent Judges of the Special Court. We also make it clear that Shri.P.P.Birajdar, the 5th Additional District & Sessions Judge, Pune was not the competent Judge to handle the case on 5.5.2005, since there was no Notification issued under section 5 of the MCOC Act, 1999 appointing him as the Judge of the Special Court. However, that does not deter us, because we are considering the legality or illegality of the order on the date of return. Then the question arises whether the exercise of power, as reflected from the order sheet and remand warrants, is appropriate exercise under section 309 of the Code of Criminal Procedure, 1973.

28. In this respect, we make a reference to the matter of **Mashooq Ahmad v/s. State of Uttar Pradesh reported in 1987 ALL L. J. 329.** In paragraph 16, it is observed by the learned Single Judge of the Allahabad High Court as follows:

"I have attempted to bring up to date law on the point on record. A perusal of the same will now make it absolutely clear that a remand order is necessary but it can be a remand by issue of warrant also. In the present case there is no dispute that the committal order itself sought to grant remand at least up to 9.8.1985. Section 209(b) of the Code of Criminal Procedure, 1973 directs the Magistrate to remand the accused to custody during, and until conclusion of the trial. In the present case if the worst interpretation is put to the order passed by the learned Magistrate, it will still have to be accepted that there was a valid remand up to 9.8.1985. Thereafter the order sheet of the Sessions Court has been placed on record and it shows that no specific order of remand was passed on the order sheet but the accused came to be present before the Court from time to time in Jail custody and fresh dates were

given. Naturally, they must have been endorsed on the warrant. On 25.9.1985 the charges were framed and dates for trial were fixed and thereafter also on a number of dates the accused applicant appeared before Sessions Court, took orders and was sent back to jail custody and it is not disputed anywhere in the lengthy petition that has been presented to this Court that a valid warrant of custody was drawn out. It is settled now that under Section 309(2) of the Cr. P. C. the only requirement of the law is that if an adjournment is made, then by a warrant the accused may be remanded to custody. **Sub-sections (1) & (2) of Section 309 of the Cr. P. C., if taken together will make it absolutely clear that there is no need to pass a written order of remand on the order sheet. The requirement of the law is that a written order should be passed only justifying the adjournment but so far as the remand is concerned, only**

warrant will be sufficient. Thus, while we may agree that no specific order has been passed by the Sessions Judge after the receipt of the record by him remanding the accused to Jail custody, it is also undoubted that from time to time the accused had been appearing before the Court of Session and was being given dates for further appearance and it necessarily follows that a warrant must have been drawn out on which endorsements of the dates must have been made. This is the requirement of the rules and there is no allegation anywhere in the petition that no such warrant had been drawn out. In the entire petition there is no challenge to the legality of the warrant nor has it been said that no warrant had been drawn out. Under these circumstances, Section 309(2) shall stand completely fulfilled even though on the order sheet no specific order of remand had been written out....."

"It is thus clear that in this case there is a valid remand upto 9.8.1985 under Section 309(b), Cr. P. C. in view of the order of the Magistrate dated 29.7.1985. Thereafter even if there was no remand for some time, the illegality would stand cured and the Court would see the position on the date when this application was moved and it is clear that thereafter right from 10.9.1985 when the accused was brought before the learned Sessions Judge and a date for framing of the charges was given and then he was sent back to Jail with a direction to be produced again on 25.9.1985 and on subsequent dates, it will mean that he was in custody from 10.9.1985 on the basis of valid warrant of remand made under section 309(2) of the Code of Criminal Procedure, 1973. There was thus no illegality in his detention and no question of bail arises in his favour."

29. A similar reference can be made to the judgment reported in the matter of Kheraj & Others v/s. State of Rajsthan (1984 Cri. L. J. 408) while answering the contention that as a matter of fact there was no order or directionof remand of the accused petitioners to judicial custody on May 30, 1983 as the order sheet in this respect is silent, the Court observed as under:

> "So far as the (iii) contention goes, it may at once be stated that although in the order sheet dated May 30, 1983 there was no mention of the remand of the accused persons to judicial custody but such a direction clearly appears in the warrants. The direction on the warrants on May 30, 1983 is in the following terms.

(Text in Hindi Language. Please refer original.)

> These endorsements have been made on the original warrants addressed to the Incharge of Sub-Jail Nagpur to whom the accused persons had been

> first forwarded on September 18, 1982 and on which the subsequent remands were directed first by the Magistrate and after the commitment by the learned Sessions Judge from time to time. In these circumstances it cannot be said that there was no order or direction for the remand of the accused to judicial custody on May 30, 1983."

30. We are faced with the same circumstances in respect of the orders passed by the Judge of the Special Court under the MCOC Act, 1999, as we have already elaborated the facts. We would like to advert to sub-section (2) of Section 309 of the Code of Criminal Procedure, 1973, which is to the following effect:

> "309. Power to postpone or adjourn proceedings-
>
> (1).....
>
> (2) If the Court after taking cognizance of

> an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody."

31. On plain reading of this provision, we find that the court is supposed to record the reasons for the adjournment or postponement of the case. However, after that exercise is complete, if the accused is in jail, the court may remand by warrant to the custody. This does not mean that the Judge shall pass an order in order sheet. Suffice it if the Judge issues warrant remanding the accused to the judicial custody. No doubt, for an ideal exercise of the judicial power, the Judge will assign the reasons for the postponement of the case and also pass an order remanding the accused to the judicial custody. However, that is an ideal position. But, if a Judge passes an order giving reasons for the adjournment or the postponement of the case and thereafter issues a warrant duly signed by him remanding the accused to the judicial

custody, the same exercise will also be a proper exercise so far as Section 309(2) is concerned, because, the warrant is required to be given along with the accused to the Suprintendent of Jail to keep the person in judicial custody, and therefore the said warrant is addressed to the Jailor informing him about the period of detention and the production of the accused. Therefore, we are of the same view as has been reflected in the above referred two judgments. We find that the Judge of the Special Court has properly exercised the power maintaining the order sheet showing the adjournments, issuing warrants and further extending the said warrants by making an appropriate endorsements on the said warrants. Those endorsements do show that the accused- Petitioners have been remanded to the judicial custody by the Judge of the Special Court. We find, at least on this count, the warrant cannot be said to be improper one.

32. Shri. Amin Solkar, learned counsel appearing for the Petitioner No.5 tried to develop an argument, taking recourse to the judgments of the Apex Court in the matter of *State of Tamil Nadu v/s. V. Krishnaswami Naidu & Another reported in AIR-1979 SC 1255; A. R. Antulay v/s. Ramdas S. Naik & Another, reported in AIR-1984 SC 718; and Harshad*

Mehta & Ors. v/s. State of Maharashtra, reported in 2001 Cri. L. J. 4259 that in the first proviso to sub-section (2) of Section 309 of the Code, the word "Magistrate" shall be substituted by incorporation of the words "Special Court" or "Special Judge", and thereby further contended that the judicial custody granted by the Judge of the Special Court in the present matter being exceeding for a period of more than 15 days, is bad and illegal, and therefore, the writ of habeas corpus shall be allowed.

33. This requires us to scrutinise the position of the Judge of the Special Court. In the matter of State of Tamil Nadu v/s. V. Krishnaswami Naidu & Another reported in AIR-1979 SC 1255, the Apex Court has considered the provisions of the Criminal Law (Amendment) Act, 1952 and relevant provisions of the Criminal Procedure Code, 1974. The Apex Court was required to consider this, because there was a provision that the Special Judge was empowered to take cognizance of the offence without the accused was being committed to him for trial and in trying such accused person he was required to follow the procedure prescribed by the Code of Criminal Procedure, 1973 in the trial of warrant cases by Magistrates. In that case, the question, therefore, was in what way the

provisions of Section 167 of the Code of Criminal Procedure, 1973 will apply. The Apex Court ultimately in paragraph 10 has observed as under:

> "In the result on consideration of the relevant provisions of the Criminal Law (Amendment) Act and the Cr. P. C., we have no hesitation in coming to a conclusion that a Special Judge would be a Magistrate empowered to try a case under section 167 of the Code of Criminal Procedure, 1973. The Special Judge will proceed to exercise the powers that are conferred upon a Magistrate having jurisdiction to try the case."

34. In the matter of A. R. Antulay v/s. Ramdas S. Naik & Another, reported in AIR-1984 SC 718, the question in respect of the jurisdiction of the Special Court was raised on two specific counts: *(i) That a Court of the Special Judge set up, under Section 6 of the Criminal Law Amendment Act, 1952 cannot take cognizance of any of the offences enumerated in Section 6(1)(a) & (b) upon a private complaints of facts constituting the offence and (ii)*

that where there are more special judges than one for any area, in the absence of a specification by the State Government in this behalf, specifying the local area over which each special Judge would have jurisdiction, the Special Judge (Mr. Bhutta) had no jurisdiction to take cognizance of the offences and try the case." The Hon'ble Supreme Court observed in paragraph 34 as under:

> "A Court of special Judge is a Court of original criminal jurisdiction and it is not necessary to treat him either a Magistrate or a Court of Sessions save and except in respect of specific provision wherein it is so provided."

. After scrutinising the provisions of the said Act, in paragraph 27, it is observed by the Apex Court as:

> The net outcome of this position is that a new Court of original jurisdiction was set up and whenever a question arose as to are its powers in respect of specific question

brought before it as a Court of original criminal jurisdiction it had to refer to the Criminal P. C. undaunted by any designation claptrap. When taking cognizance a Court of special Judge enjoyed the powers under S. 190. When trying cases, it is obligatory to follow the procedure for trial of warrant cases by a Magistrate though as and by way of status it was equated with a Court of Sessions. The entire argument inviting us to specifically decide whether a court of special Judge for a certain purpose is a court of Magistrate or a Court of Sessions evolves around a mistaken belief that a special Judge has to be one or the other, and must fit in the slot of a Magistrate or a court of Sessions. Such an approach would strangulate the functioning of the Court and must be eschewed. Shorn of all embellishment, the Court of a special Judge is a Court of original criminal jurisdiction. As a court of original

> criminal jurisdiction, in order to make it functionally oriented some powers were conferred by the statute setting up the Court. Except those specifically conferred and specifically denied, it has to function as Court of original criminal jurisdiction not being hide-bound by the terminological status description of Magistrate or a Court of Sessions. Under the Code, it will enjoy all powers which a Court of original criminal jurisdiction enjoys save and except the ones specifically denied."

35. In the matter of Harshad Mehta & Ors. v/s. State of Maharashtra, reported in 2001 Cri. L. J. 4259, the Apex Court was considering the question as to whether the Judge of the Special Court constituted under the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 can grant a pardon in exercise of powers under section 306 & 308 in the absence of a specific provisions in this respect in the Act. The Apex Court in paragraph 48 observed as:

" To our mind, the Special Court has all the powers of a Court of Sessions and/or Magistrate, as the case may be, after the prosecution is instituted or transferred before that court. The width of the power of the Special Court will be same whether trying such cases as are instituted before it or transferred to it. The use of different words in Sections 6 & 7 of the Act as already noticed earlier also show that the words in Section 7 that the prosecution for any offence shall be instituted only in special court deserve a liberal and wider construction. They confer on the Special Court all powers of the Magistrate including the one at the stage of investigation or enquiry. Here, the institution of the prosecution means taking any steps in respect thereof, before the Special Court. The scheme of the Act nowhere contemplates that it was intended that steps at a

pre-cognizance stage shall be taken before a Court other than a Special Court. We may note an illustration given by Mr. Salve, referring to Section 157 of the Code. Learned counsel submitted that the report under that section is required to be sent to a magistrate empowered to take cognizance of an offence. In relation to offence under the Act, the Magistrate has no power to take cognizance. That power is exclusively with the Special Court and thus the report under section 157 of the Code will have to be sent to the Special Court though Section requires it to be sent to the Magistrate. It is clear that for the expression "Magistrate" in Section 157, so far as the Act is concerned, it is required to be read as "Special Court" and likewise in respect of the other provisions of the Code. If the expression "Special Court" is read for the expression "Magistrate" everything will fall in line. This

harmonious construction of the provisions of the Act and the Code makes the Act work. That is what requires by principles of statutory interpretation. Section 9(1) of the Act provides that the Special Court in the trial of such cases follow the procedure prescribed by the Code for the trial of the warrant cases before the Magistrate. The expression "trial" is not defined in the Act or the Code. For the purpose of the Act, it has a wider connotation and also includes in it the pre-trial - trial stage as well. **Section 9(2) makes a Special Court, a Court of Session by a fiction by providing that the Special Court shall be deemed to be a Court of Session and shall have all the powers of a Court Session. In case, the Special Court is held held not have dual capacity and powers, both of the Magistrate and the Court of Session, depending upon the stage of the case, there will be a complete hiatus.**"

36. Thus, it will be revealed that the position of the Special Judge under the Criminal Law (Amendment) Act, 1952 was considered in *State of Tamil Nadu v/s. V. Krishnaswami Naidu & Another reported in AIR-1979 SC 1255* at the stage of Section 167 proceeding of the Code, and to that extent the court permitted to read the words "Magistrate" by word "Special Judge". In the matter of *A. R. Antulay v/s. Ramdas S. Naik & Another, reported in AIR-1984 SC 718*, the Apex Court considered the position of the Special Judge under the Criminal Law (Amendment) Act, 1952 in relation to the Prevention of Corruption Act. However, the stage at which it was considered was a stage when the process was issued by the Special Judge. In *Harshad Mehta & Ors. v/s. State of Maharashtra, reported in 2001 Cri. L. J. 4259* Court has considered the question as to whether the pardon provision, as contained in Sections 306 & 307 of the Code, applies to the proceedings before the Special Judge under the Act, and ultimately the Court has observed that the Special Court is a Court of Session by fiction as provided in Section 9(2) and shall have **all the powers of a Court Session. It is emphasised that the Special Court is having a dual capacity and powers, both of the Magistrate and the Court of**

Session. However, as to when such power and capacity is to be exercised, the Apex Court has observed that it will be **depending upon the stage of the case, there will be a complete hiatus.**

37. Coming to the provisions of the the MCOC Act, 1999, applying the test and the ratio as evolved in the above referred three cases, we also find that the Judge of the Special Court under the MCOC Act, 1999 is having a dual capacity, both of the Magistrate as well as of the Sessions Judge. However, the question which we have to deal with is as to whether while exercising the powers under Section 309 of the Code of Criminal Procedure, 1973, the Judge of the Special Court shall be treated as a Magistrate covered by the First proviso of sub-section (2) of Section 309 of the Code of Criminal Procedure, 1973.

. In the facts of the present case we have narrated the sections under which the Petitioners were charged. One of the Sections, namely, Section 255 of the Indian Penal Code is triable by the Sessions Court and equally it is punishable with imprisonment for life, or imprisonment for 10 years and fine. Rest of the sections are also punishable with the serious punishment. But out of all these sections, section

255 requires trial by the Sessions Court and not by the Court of Magistrate. Therefore, for the trial of these sections, the Judge of the Special Court has to hold the capacity and the powers of the Sessions Judge. It is further pertinent to note that sub-section (2) of Section 9 of the MCOC Act, 1999 provides that *where an offence triable by a Special Court is punishable with imprisonment for a term not exceeding three years or with fine or with both, the Special Court may, notwithstanding anything contained in sub-section (1) of Section 260 or Section 262 of the Code try the offence in summary way in accordance with the procedure prescribed in the Code and the provisions of Sections 263 to 265 of the Code shall, as far as may be, apply to such trial.* Proviso to said sub-section (2) contemplates that, where in the course of a summary trial under this sub-section, it appears to the Special Court that the nature of the case is such that it is undesirable to try in a summary way, the Special Court shall recall any witnesses who may have been examined and proceed to re-hear the case in the manner provided by the provisions of the Code for the trial of such offence and the said provisions shall apply to and in relation to a Special Court as they apply to and in relation, to a Magistrate.

. Thus, on reading sub-section (2) of Section 9 of the MCOC Act, 1999 it is clear that in respect of the certain offences punishable with imprisonment for a term not exceeding three years, the summary procedure has been provided and discretion has been left with the Special Court to try the same case as a regular triable case as a Magistrate may try it. However, this procedure will not apply to the offences which are punishable with imprisonment exceeding the term of three years. Therefore, sub-section (2) is having application to that effect only. Rest of the cases will have to be considered under sub-section (4) of Section 9 of the MCOC Act, 1999.

38. Sub-section (4) of Section 9 of the MCOC Act, 1999 reads thus:

> "Subject to other provisions of this Act, a Special Court shall, for the purpose of trial of any offence, have all the powers of a Court of Session and shall try such offence as if it were a Court of Session, so far as may be, in accordance with the procedure prescribed in the Code for

the trial before a Court of Session."

. Thus, the procedure prescribed for the sessions cases in the Code will be applicable to the cases before the Special Court, excluding the cases enumerated under sub-section (2) of Section (9). Thus, the character of the Judge of the Special Court is that, while conducting the cases under sub-section (2) of Section 9, he exercises the summary power or a power of the Magistrate in the capacity of the Sessions Judge. However, when he tries the case excluding the case covered by sub-section (2) of Section 9, he acts as a full-fledged Sessions Judge having the power and capacity to try the cases as a Sessions Judge as provided in Chapter-XVIII of the Code of Criminal Procedure, 1973. The present case, therefore, is triable as a sessions case. This has been analysed, because as per the ratio laid down in Harshad Mehta's case (supra), the capacity and the powers of the Judge of the Special Court as a Magistrate and/or Sessions Judge will have to be decided in reference to a stage of the case so as to fill up the break-up, if any. Thus, we find that after the cognizance is taken by the Judge of the Special Court under the MCOC Act, 1999, the Judge of the Special Court holds a capacity and power of a

Sessions Judge for the trial of the cases and for grant of remand etc., under Section 309 of the Code of Criminal Procedure, 1973. Thus viewed, it is not necessary to incorporate the word "Special Judge" in the proviso to sub-section (2) of Section 309 of the Code of Criminal Procedure, 1973, as submitted by the learned counsel Shri. Amin Solkar. We reject the said submission being without any merit.

39. Once we hold that first proviso to sub-section (2) of Section 309 of the Code of Criminal Procedure, 1973 is not applicable to the present facts of the case, there is no limitation on grant of remand for 15 days on the Judge of the Special Court, since he holds the power and capacity to try the cases as a Sessions Judge. Thus viewed, we find that the proviso in that circumstance is not applicable. On plain reading of the section, it is clear that limitation provided in First Proviso to sub-section (2) of Section 309 of the Code of Criminal Procedure, 1973 is not applicable to the Sessions Judge. In this respect we have a support from the decision in the matter of **Koomar Indraneel @ Caesar & Another V/s. The State of Bihar (2001 Cri. L. J. 1040).** It is observed in paragraph 5, by the Court that:

> "Now coming to the submission advanced on behalf of petitioners that an accused in custody has to be produced before the Court of Session where his case has been committed by a Magistrate after every fifteen days as required by Section 309, the Code of Criminal Procedure, 1973, I find that the limit of fifteen days for remanding an accused to custody as provided under Section 309, Cr. P. C. according to which "no Magistrate shall remand an accused person to custody under this Section for a term exceeding fifteen days at a time." The absence of mention of Court of Session in this proviso leaves no room for any doubt that a Court of Session has been kept out of this proviso defining the limit of period of remand at a time of an accused to custody."

. In the matter of Suresh Ramtirath Yadav v/s. State of Gujarat reported in 1990 Cr. L. J. , 1834, the Gujarat High Court has also held in

paragraph 18 that:

> "Sub-section (2) of Section 309 of the Criminal Procedure Code contemplates that the reasons have to be recorded only for adjourning the enquiry or trial. As regards the remand order, there is no such inhibition of recording reasons signed by the court. Even the provision of restriction of remand of fifteen days only at a time applies to a Magistrate and not to a Sessions Court or a Designated Court."

40. Thus, we find that under Section 309(2) the Code of Criminal Procedure, 1973, the Judge of the Special Court holds a capacity and power of the Sessions Judge while remanding the accused to the judicial custody. There is no limit of fifteen days to remand the accused at a time. Therefore, we find that remand orders which have been passed in the present case for a period exceeding fifteen days at a time are valid one.

41. Thus, we find that the orders of remand and extension of the same as reflected from the remand warrants issued under Section 309(2) in the present

case is the proper exercise of power by the Judge of the Special Court. Therefore, five remand orders which are passed on 8.6.2005, 20.6.2005, 27.7.2005, 19.8.2005 and 16.9.2005, existing as on the date of return of the present petition are valid and legal one. Therefore, the judicial custody of the Petitioners on the date of return is valid one.

42. The Petitioners have relied upon judgment in the matter of **Ram Narayan Singh v/s. State of Delhi & Others reported in AIR-1953 SC 277**. It is to be noted that in that case the court directed the production of the orders of the Magistrate remanding the Petitioners for inspection by a counsel of the Petitioners. However, the orders produced merely directs the adjournment of the case till 11th March and was not containing further direction remanding the accused to the custody and thereafter on 11th March the warrant was produced. This was done in violation of the direction given by the Apex Court on 10th March. Therefore, in paragraph 4 the Apex Court observed that, "*In a question of habeas corpus, when the lawfulness or otherwise of the custody of the persons concerned is in question, it is obvious that these documents, if genuine, would be of vital importance, but they were not produced,*

notwithstanding the clear direction contained in our order of 10th March," and ultimately the remand warrant which was produced on record was not considered by the Court and only order sheet was considered. Thus, on the date of hearing of the petition, in that case, there was no remand order. Therefore, writ of habeas corpus was granted. Such is not the case in the present matter. In the present matter, we directed the respondent to produce the papers in respect of the order sheets and remand warrants, and as per the directions of the Court, on returnable date, all these documents have been produced on record coupled with the material to show the efforts made by the respondents to obtain the necessary documents as per the directions of this court. We have already found that there were five valid remand orders passed on the date of return. Therefore, we find that the reliance of the Petitioners on this case is uncalled for.

43. The Petitioners have also relied upon the judgment in the matter of **State of T. N. v/s. Parmasiva Pandian reported in AIR-2001 SC 2972.** In that case the question which the Apex Court was considering was : Whether the special court which ceased to be a special Court under the Essential

Commodities (Special Provisions) Act, 1981, but continued as such under the Narcotic Drugs and Psychotropic Substances Act, 1985 has the power to remand an accused who is implicated for an offence under the Essential Commodities Act, 1955. Thus, it will be seen that at the relevant time the Special Court appointed under the Essential Commodities (Special Provisions) Act, 1981 has ceased to be a special Court under the Essential Commodities Act, since the Act has lapsed and was not further extended by the appropriate legislation. However, the same court also continued to be a special court under the NDPS Act, 1985 and before the same court the case under the Essential Commodities Act was placed for remand instead of placing it before the regular magistrate who had the jurisdiction. In paragraph 16, the Apex Court observed that:

> "On a fair reading of the above provisions it is clear that during the period of the EC (Special Provisions) Act was in force the special Court constituted for trial of offences under EC Act had exclusive jurisdiction to try such cases. The special Court had also

the power to pass order of remand under Section 167 but the provision changed after the EC (Special Provisions) Act lapsed by efflux of time. Thereafter, the position that used to prevail before the EC (Special Provisions) Act was in force stood restored and the judicial Magistrates who were previously competent to try the EC Act cases got the jurisdiction to deal with such cases. The position is beyond any pale of doubt that remand orders passed by the special Court at Madurai, long after it has ceased to exercise jurisdiction in cases under the EC Act are incompetent.

Coming to the question whether the special Court constituted for trial of cases under the NDPS Act could exercise the power of remand of an accused in the EC Act case, which it was doing when the special Court constituted for the EC Act cases was in existence, the answer to the

> question is in the negative; for the simple reason that the special Court constituted for the NDPS Act cases is a court of exclusive jurisdiction for trial of particular class of cases provided under the NDPS Act and it has not been vested with power of judicial Magistrate for the purpose of dealing with EC Act cases. To accept the contention raised on behalf of the appellant in this regard would in our view be contrary to the scheme of things under the Criminal Procedure Code, which specifically vest the power of remand under S. 167 in Judicial Magistrate. The High Court was, therefore, was right in negativing the contention raised on behalf of the State Government in this regard."

44. Thus, it will be seen that remand orders which were under consideration, were passed by the Court which was not competent to pass such remand orders under Section 167 of the Code. Such is not the case in the present matter, the Judge of the Special

Court was competent person to pass the remand orders, as we have discussed in the earlier paragraphs and the competency of the Judge of the Special Court is also not in dispute in the present matter. We have also found that remand orders were properly passed by the Judge of the Special Court. Therefore, in the facts and circumstances of the present case the ratio laid down in the case of State of T. N. v/s. Parmasiva Pandian reported in AIR-2001 SC 2972 is not applicable.

45. Much emphasis has been laid by Shri. Chitnis on a case reported in **AIR-1969 SC 1014 (in the matter of Madhu Limaye & Others.).** He has submitted that when the fundamental rights of the citizens are violated, the Court has an ample power under Article 226 of the Constitution to set the person at liberty, as has been done in the Madhu Limaye's case. We are not in agreement with the learned counsel; because from the observations in the above case it is clear that Their Lordships did not stop after holding in paragraph 13 that Madhu Limaye and others were entitled to be released on the ground of non compliance of the provisions of Article 22(1) of the Constitution of India, but Their Lordships further examined the second point formed in paragraph 7 of the

said judgment that, whether valid order of remand existed or not. Once Their Lordships found that remand order by Magistrate directing detention in the jail custody was without application of mind to all the relevant matters and Their Lordships observed that the detention in custody being in violation of Article 22(1) of the Constitution of India, Madhu Limaye and others were entitled to be released forthwith. This negates the contention of the learned counsel Shri. S. R. Chitnis, because we find that in the matter of Madhu Limaye on the date of return the Court was satisfied that there was no valid detention order.

. It is equally worthwhile to note that in the matter of Suresh Ramtirath Yadhav v/s. State of Gujarat reported in 1990 Cr. L. J. 1834, while answering the submision based on Madhu Limaye's case relating to the violation of Article 22(1) of the Constitution, the Gujarat High Court observed that:

> "We are afraid, that the decision rendered by the Supreme Court lays down no such principle that even in a case where a person has been taken into custody under the Terrorist and Disruptive Activities (Prevention) Act, 1985, and proper trial is

> proceeded with by periodically remanding the undetrial prisoner, he is to be released. In the above said Supreme Court decision, the detention itself is questioned as violative of Article 22(1) of the Constitution of India and in the facts and circumstances of the case of illegal arrest, the Supreme Court held that the order or remand is a mechanical one and cannot cure the constitutional infirmities in the arrest."

. These observations are aptly applicable to the facts of the present case. Therefore, we hold that the submissions made by the learned counsel based on the Madhu Limaye's case are not acceptable.

46. Reliance has also been placed on an unreported judgment of this Court of Aurangabad Bench dated 18.2.2003 in Criminal Application No. 2154 of 2002 with Criminal Petition No. 523 of 2002. This was a case in which the Judge of the Special Court under the MCOC Act, 1999 was not appointed at Nashik and when his appointment was in process, the matter was placed for appropriate remand orders before the said Additional District & Sessions Judge. Therefore,

if the facts involved in this case are taken into consideration, they show that on the date of the remand order there was no duly constituted Special Court under the provisions of the MCOC Act, 1999. However, such is not the case in the present matter.

47. If the cases relied upon by the Petitioners are considered, it will be seen that in those cases on the date of return there were no valid remand orders and/or judicial custody orders. However, we have analysed in this judgment, in our case on the date of return there were five valid orders passed by the competent Court granting judicial custody remand. Therefore, the cases relied upon by the learned counsel for the Petitioners are not helpful to the Petitioners in this petition.

48. Before parting with this judgment, we cannot refrain ourselves from adverting to one circumstance that this case is a product and consequence of non exercise of powers under sub-section (5) of Section 5 of the MCOC Act, 1999 by the Judge of the Special Court constituted under the MCOC Act, 1999. Had the Judge of the Special Court passed a general or special orders regulating the business of the said Court and giving directions as to

which court shall deal with the urgent business of the Special Court in the absence of the Judge or Additional Judge of the Special Court, probably, the case would not have arisen at all. Under these circumstances we issue directions to all the Judges of the Special Courts under the MCOC Act in the State of Maharashtra to pass general or special orders under Section sub-section (5) of Section 5 of the MCOC Act, 1999.

49. The Registrar General is directed to issue necessary directions to all the Special Courts constituted under the MCOC Act, 1999 to pass appropriate orders under sub-section (5) of Section 5 of the MCOC Act, 1999.

50. However, this will not be sufficient, because under these provisions, the Judge of the Special Court can give powers to another Judge of the Special Court. We have to also visualise a situation where there is only one Judge of the Special Court, then in that circumstance whom the powers should be given to pass urgent orders and transact the urgent business. So also, we have to also visualise a circumstance where there are more than one Judge of the Special Court, as in the present case, but

everyone proceeds on leave or holiday, as in the present case, and ultimately the situation arises where there is no Judge of the Special Court available to pass the appropriate orders. In that eventuality, the provisions of the MCOC Act are found to be inadequate. To overcome this situation, amendments in the sub-section (5) of Section 5 of the MCOC Act are very much desired. By this amendment, under special circumstances the permission to place the matters before the District Judge or a Judge as directed by the District Judge, shall be given so as to pass the appropriate valid remand orders. But, this cannot be done unless sub-section (5) of Section 5 of the MCOC Act, 1999 is amended. Therefore, we suggest the Government of Maharashtra to effect the appropriate amendments in sub-section (5) of Section 5 of the MCOC Act, 1999 in respect of the carrying out of the urgent business in the absence of a the Judge of the Special Court to deal with the urgent business of the Special Court.

51. In the result, we find there is no substance in the petition. The criminal writ petition is hereby dismissed. The rule is discharged.

52. Shri. Solkar, at this stage, requests for

leave to appeal to the Supreme Court. We do not find any vital question involved in this case. The leave is hereby rejected.

(S.R.SATHE,J.) **(S.B.MHASE, J.)**